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IN THE

Supreme Court of the United States

October Term, 1944.

No. 1047

BLAISE PASQUA, MILDRED FERRIS and MARY LEE HENDRIX,

versus

UNITED STATES OF AMERICA.

PETITION OF BLAISE PASQUA, MILDRED FERRIS AND MARY LEE HENDRIX FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

G. WRAY GILL,
Attorney for Petitioners.

SUBJECT INDEX.

	PAGE
OPINION BELOW	2
JURISDICTION	2
SUMMARY STATEMENT OF MATTER INVOLVED	3
QUESTIONS PRESENTED	5
REASONS RELIED ON FOR ALLOWANCE OF WRIT	6
TRANSCRIPT ANNEXED	8
SUPPORTING BRIEF	8
PRAYER	8
BRIEF IN SUPPPORT OF PETITION FOR WRIT OF CERTIORARI	10

TABLE OF CASES.

United States vs. Francis X. Gomila and Anthony Chauppette, No. 11084, U. S. C. C. A. 7, 10, 11, 13
Lee F. Weiler vs. United States of America, #340, October 1944 14
Chambers v. Florida, 309 U. S. 227, 60 S. Ct. 472 14

AUTHORITIES CITED.

Section 398, Title 18 of Criminal Code, U. S. C. A. . . .2, 3, 6
Paragraph (a) of Section 240 of the Judicial Code 2

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Blaise Pasqua, Mildred Ferris and Mary Lee Hendrix, citizens of the United States, domiciled in the State of Louisiana, respectfully bring this their application for a writ of certiorari, to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in this criminal case.

OPINION BELOW.

Petitioners were convicted on April 19, 1944 in the District Court of the United States for the Eastern District of Louisiana of violating Section 398 in Title 18, U. S. C. A., the white slave traffic act. They were found guilty as charged on both counts of the indictment and the defendant, Pasqua, was sentenced to serve ten years and the two female defendants, Mildred Ferris and Mary Lee Hendrix, were sentenced to serve eight years each. Petitioners thereupon took their appeal to the United States Circuit Court of Appeals for the Fifth Circuit, where judgment was rendered affirming the conviction of all three defendants on January 3, 1945 (see Opinion, Tr. 379). Petitioners within the delays allowed by law, and on January 20, 1945, filed their petition for rehearing (see Tr. 384) in the said United States Circuit Court of Appeals for the Fifth Circuit, which petition for rehearing was denied (see Tr. 395) on February 20, 1945; that on February 27, 1945 a stay of mandate was ordered by the United States Circuit Court of Appeals for a period of thirty days to enable petitioners to appeal to this Honorable Court for a writ of certiorari to review said final judgment of the United States Circuit Court of Appeals for the Fifth Circuit (see copy of mandate, Tr. 397).

JURISDICTION.

Jurisdiction of this Honorable Court is invoked under paragraph (a) of Section 240 of the Judicial Code as amended and set forth on page 30, etc. of the Revised

Rules of the Supreme Court of the United States, making it competent for this Court to review by certiorari any case, civil or criminal, in a Circuit Court of Appeals when the application is made within thirty days after entry of judgment (denial of rehearing) as required by the rules of this Honorable Court.

SUMMARY STATEMENT OF MATTER INVOLVED.

The defendants were charged in an indictment on two counts of violating Section 398, Title 18 of the Criminal Code with reference to white slave traffic or transportation, in that they did transport certain named persons on certain specified dates from the State of Georgia to the Town of Thibodaux, Louisiana, for the purpose of prostitution or debauchery and with the intent and purpose to induce, entice and compel the said persons to become prostitutes and to give themselves up to debauchery.

The defendants were convicted on both counts and the defendant Blaise Pasqua was sentenced to serve five years on each count, to run consecutively, making a total of ten years. The defendants, Mildred Ferris and Mary Lee Hendrix, were each sentenced to five years on Count 1 and three years on Count 2, said sentences to run consecutively, making a total of eight years as to each. The defendants did not take the witness stand, nor did they place any other witness on the stand in their behalf. The Government, having rested its case, the defendants filed a motion for directed verdict (see Tr. 8), which was overruled and a bill of exception reserved. The defendants

then rested their case and filed a supplemental motion for directed verdict (Tr. 10), which was likewise overruled.

Numerous bills of exception were reserved during the course of the trial objecting to the Government introducing evidence tending to show and prove that each and every one of the defendants did have a bad reputation for morality; that the establishment involved did likewise have a bad reputation; that the defendants or one of them had sought to coerce a prosecuting witness and solicit her to change her testimony; that, further, by innuendo, did suggest that each and every one of the prosecuting witnesses had been approached, by cross-examining them on statements made to a government investigator, without the statements ever having been sought to be introduced in evidence and without the investigator being placed on the stand, and without *HAVING EVER* laid the predicate or foundation for the positive impeaching of the Government witnesses; the continuous admission of damaging, illegal hear-say testimony and the illegal questioning of the prosecuting witnesses and comments on said testimony by His Honor the Trial Judge, all of this was over the continuous and repeated objection of counsel for the defendants. The general tenor of the illegal evidence, tended to show that each of the defendants had a bad moral reputation; that the prosecuting witnesses were lying and trying to help the defendants and that the questioning and comments by the Court lended devastating emphasis to the said illegal evidence, and as heretofore stated, all continuously objected to by the defendants.

QUESTIONS PRESENTED.

The case, from the viewpoint of petitioners, presents four primary questions, any of which should warrant the issuance of a writ to review the proceedings below:

1. The denial of due process of law and equal protection of the law to a citizen of a State and of the United States, by placing his or her alleged bad reputation before the Jury, without the defendant or any of them having taken the the witness stand.

2. The questions of the Court and the statements and comments by the Court tending to lend its sanction as to the propriety of the questions objected to and, in several instances, making statements tantamount to saying to the Jury that the bad reputation of the defendants had been proven on the very point at issue.

3. The illegal questioning of the Government witnesses on matters concerning statements made out of the presence of the defendants, without having plead surprise and without ever having acquired the right to cross-examine witnesses who were only trying to tell the truth on the witness stand and to elucidate upon statements theretofore made and to explain the facts upon which the Government agent had formed an opinion contrary to their sworn statement on the witness stand.

4. The admitting in evidence of a statement, over objection of counsel, tantamount to a confession, without the predicate having been laid in either the opening statement or in the introduction of the statement itself.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The reasons relied on for the allowance of a writ of certiorari are:

1. That the constitutional and statutory rights of the petitioners have been infringed upon by a conviction of violating Section 398 in Title 18, U. S. C. A. wherein all the evidence showed that the defendants were placed on trial before a Jury and that at the incipiency of the trial, the Jury was told that the defendants had a bad moral reputation and that the establishment where they were working had a bad reputation and that the Court believed that the bad reputation had been proven.

2. That the Court did further charge the Jury that the defendants must in effect take the witness stand to testify in their behalf, by charging them that if a *prima facie* case (Tr. 338-39) is proven against the defendants and they fail to meet this *prima facie* proof by legal evidence, then that *prima facie* evidence would be sufficient to convict; thus, in effect, indirectly commenting on the failure of the defendants to take the witness stand.

3. That the Court did further charge the Jury on the question of the presumption of innocence and that the said charge was confusing, misleading and deprived your defendants of due process of law and equal protection of the law and was tantamount to saying that the presumption of innocence was *ONLY* intended to protect innocent people, leaving only one conclusion for the Jury to draw and that was that the defendants were guilty, that a

prima facie case had been proven, that the defendants had not taken the stand to refute it, and that their failure to do so accentuated the fact that they were guilty, in the light of the charge of the Court, and that they all had bad reputations.

4. That the charge of the Court in the case now presented to Your Honors on appeal for certiorari was more damaging, more devastating, more to the prejudice of the defendants and more depriving of their constitutional prerogatives than the charge in the case of *United States vs. Francis X. Gomila and Anthony Chauppette,* No. 11084 of the docket of the United States Circuit Court of Appeals for the Fifth Circuit, which conviction the Court reversed in its opinion delivered December 28, 1944, as set forth in your defendants' petition for rehearing (Tr. 391 top of page), as will be observed by comparing it with that part of the Court's charge herein complained of, set forth in the petition for rehearing (Tr. 391 bottom of page and Tr. 392).

5. That the questioning of the witnesses by the Court and the statements of the Court to the prejudice of the defendants was likewise much more damaging than was that complained of in the *Gomila* case above referred to, and the Court of Appeals was more pronounced in its condemnation in the instant case than in the *Gomila* case, and yet failed to reverse the judgment, as will be observed by a reading of the decision, because of the alleged proof of guilt of the defendants, which we again respectfully urge was the result of the illegal questioning of the witnesses, the illegal prejudicial answers given

thereto, and the questioning of the witnesses by the Court, all of which was timely objected to.

TRANSCRIPT ANNEXED.

The record having been printed for the use of the court below, and the necessary copies so printed being furnished, your petitioners have filed herewith the copies of said record as printed below, together with the proceedings and opinion in the Honorable Circuit Court of Appeals for the Fifth Circuit and due certificate thereon of the Clerk of said Court.

SUPPORTING BRIEF.

Petitioners also file herewith and make part of this application their brief in support thereof.

PRAYER.

Wherefore, petitioners, Blaise Pasqua, Mildred Ferris and Mary Lee Hendrix, respectfully pray that a writ of certiorari may issue to the Honorable the United States Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court; and that the judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be in due course reversed and set aside, and that judgment may be rendered in favor of petitioners, setting aside their

conviction and sentence pronounced below, and discharging them forthwith; and petitioners pray for all further and necessary orders proper in the premises, and for all such relief as the nature of the case may justify.

G. WRAY GILL,
Attorney for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

This petition of your defendants for a writ of certiorari presents a case where a Circuit Court of Appeals has so far sanctioned the departure of a court trial from the accepted and usual course of judicial proceedings, as to call for the exercise of this Honorable Court's power of supervision.

The Court of Appeals decided the case of *"Francis X. Gomila and Anthony Chauppette versus United States of America"*, No 11084 of the docket of the United States Circuit Court of Appeals for the Fifth Circuit during the same session and, shortly before the decision in the instant case.

In the case above cited, His Honor, the Trial Judge, made the following charge to the jury:

> "The rule of the presumption of innocence imposes upon the government the burden of establishing the guilt of each defendant, as stated, beyond a reasonable doubt, but, Gentlemen, as forceful as that rule is in protecting one charged with crime, it must never be forgotten that it was not intended, nor has it ever been intended, as extending an aid to one, *WHO IN FACT IS GUILTY*, so that he may escape just punishment. The rule is but a humane provision of the law, intended to prevent, so far as human agencies can, the conviction of an innocent defendant, but absolutely nothing more."

The above charge is also set forth on page 3 of the opinion rendered by the *Circuit Court of Appeals* in the *Gomila* case above cited. That court also, on the same page of its opinion, made the following observation:

> "The statement that the presumption of innocence 'was not intended, nor has it ever been intended, as extending an aid to one, who in fact is guilty, so that he may escape just punishment' is not a correct statement of the law. The *presumption* of *innocence applies alike* to the *guilty* and to the *innocent*, and the burden rests upon the Government throughout the trial to establish, by proof beyond a reasonable doubt, the guilt of the accused. Until guilt is established by such proof, the defendant is shielded by the presumption of innocence. The fact of guilt does not enter into the application of the rule, the intent and purpose of which is to protect *all* persons coming before the courts charged with crime until the presumption of innocence is overthrown by evidence establishing guilt beyond a reasonable doubt; and, where the evidence is purely circumstantial, to the exclusion of every reasonable hypothesis of innocence."

Particular attention is called to the words above used, "the *presumption* of *innocence* applies *alike* to the *guilty* and to the *innocent*" and "the fact of guilt does not enter into the application of the rule, the intent and purpose of which is to protect all persons coming before the courts charged with crime until the presumption of innocence is overthrown by evidence establishing guilt beyond a reasonable doubt". How then can this same Court consistently hold (the errors being the same and more properly ex-

cepted to in the instant case) that they be called one thing in the *Gomila* case and have another meaning in the case of your defendants?

The opinion of the Court of Appeals in the case now before Your Honors holds:

> "The record discloses that the trial judge from time to time would break in and interrupt questions being propounded to the witnesses both by counsel for the Government and for the defendants. This line of questioning appears throughout the trial and until the conclusion of the evidence. This practice of the court was highly improper, as it prevented an orderly trial of the case. However, we do not find that such practice by the trial judge constitutes prejudicial error in this case. A similar practice of the court in the case of Gomila and Chauppette vs. U. S., recently decided, cumulated with other errors discussed therein, was held to be prejudicial. In *that* case the testimony connecting the appellants with the crime charged was almost wholly that of confessed accomplices, uncorroborated. *Here* the testimony *establishing* the *guilt* of the appellants is *uncontradicted* and of a nature to leave no room for doubt as to the guilt of appellants. Under such condition, the error of the trial judge was not prejudicial."

It is not to be expected that errors committed by the lower court and recognized by the appellate court can with impunity be cast aside and held for naught merely because evidence introduced tended to show guilty, particularly when that very same evidence forms the basis or gravamen of the complaints alleged and set forth in

the numerous bills of exception reserved during the trial. A reading of the record will show the manner of the questioning of the prosecuting witnesses, the questions propounded, the manner of reception by the Court and the comments of the court thereon. What questions would have been propounded and what would have been answered, and how would they have been accepted, had the defendants taken the stand or elected to place witnesses on the stand in their behalf, is, of course, now only a matter of conjecture, and it is sincerely urged that Your Honors can not in fairness to anyone answer this question until you have read the record and have asked yourselves the question, what the result might have been.

Your Honors will please refer to page six of the petition for rehearing (Tr. 389). It will there be observed that the defendants were branded as being of bad moral character and any testimony that they might have given would have been received with prejudice and looked upon with suspicion by the Jury. Any defense that they might have had was cancelled in advance and, for the Court of Appeals to say that what was *reversible* error in the *Gomila* case is not to be considered in *this* case is to *cancel* the right of the defendants to equal justice and deprive them of equal protection of the law without mental reservation or equivocation.

It is further urged that a reading of the record in the case now presented to Your Honors will show a cumulation of errors infinitely more damaging, more consistently committed and more constantly objected to than in the *Gomila* case.

Your Honors recently granted a writ of certiorari in the case of *Lee F. Weiler vs. United States of America*, No. 340 of the October Term, 1944, to the United States Circuit Court of Appeals for the Third Circuit and in sustaining the writ, on page four of the opinion said:

> "Thus to permit the judge finally to pass upon this question would enable a jury to convict on the evidence of a single witness, even though it believed, contrary to the belief of the trial judge, that the corroborative testimony was wholly untrustworthy."

> "We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility."

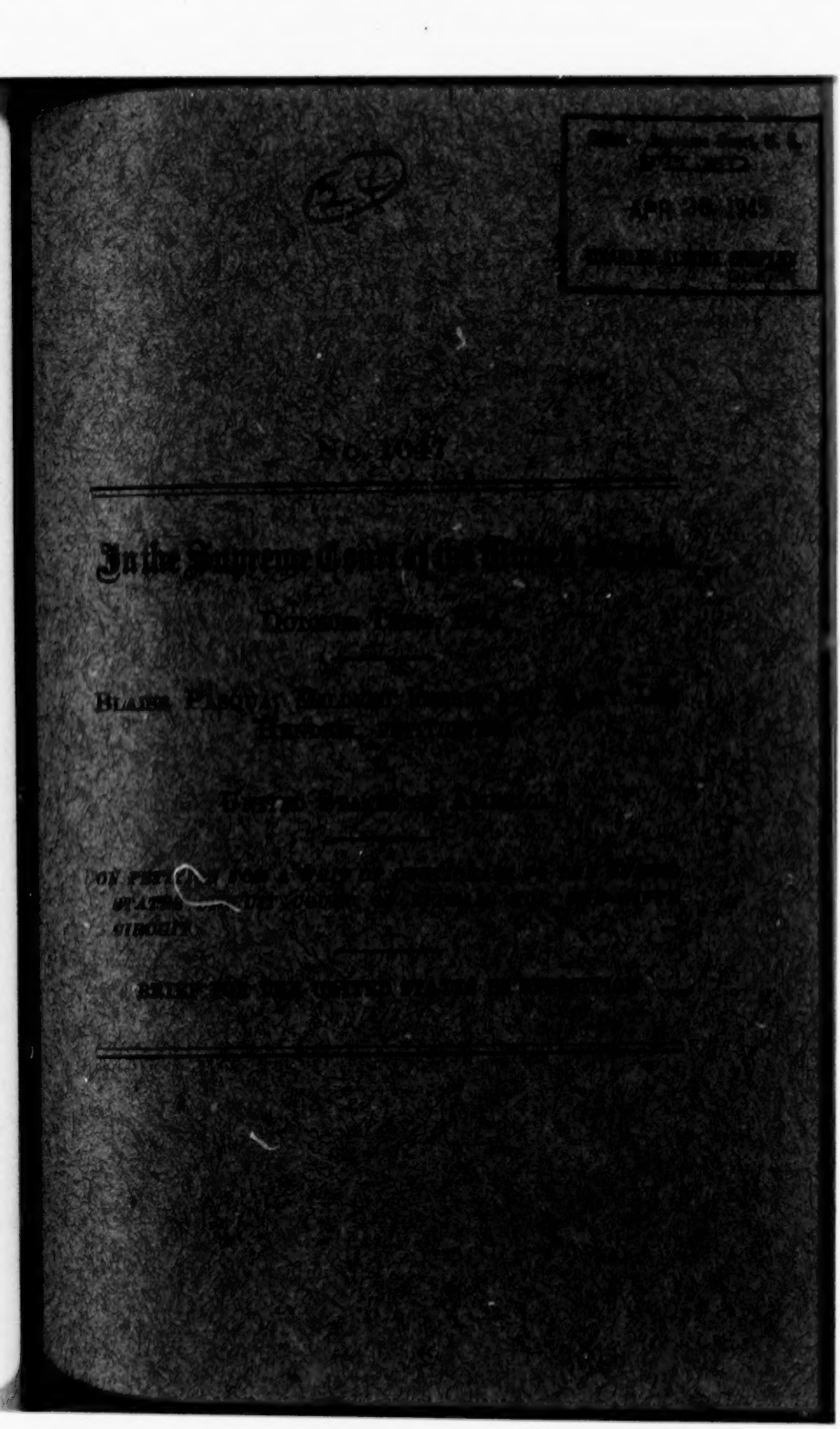
The authorities cited in the petition for re-hearing (Tr. 385-393) accurately and definitely set forth the inconsistencies hereinabove complained of and, while commending the Court of Appeals on its reversal of the decision of the lower court in the *Gomila* case, we most positively maintain that it would be unfair and unjust to refuse the same privilege and prerogative to the defendants in this case as was granted in the *Gomila* case.

While the case at bar differs in its basic facts from *Chambers v. Florida*, 309 U. S. 227, 60 S. Ct. 472, we can find no more appropriate language with which to conclude this brief, than the quotation from the eloquent opinion of Mr. Justice Black:

"Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."

Respectfully submitted,

G. WRAY GILL,
Attorney for Defendants.



INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	13

CITATIONS

Cases:

Allen v. *United States*, 164 U. S. 492	12
Allis v. *United States*, 155 U. S. 117	13
Athanasaw v. *United States*, 227 U. S. 326	6
Bochm v. *United States*, 123 F. 2d 791, certiorari denied, 315 U. S. 800	12
Glasser v. *United States*, 315 U. S. 60	9
Gomila v. *United States*, 146 F. 2d 372	11
Hargrave v. *United States*, 25 F. 2d 258	9
Holmgren v. *United States*, 217 U. S. 509	13
Hyde v. *United States*, 225 U. S. 347	8
Johnston v. *United States*, 318 U. S. 189	13
Kettenbach v. *United States*, 202 Fed. 377, certiorari denied, 229 U. S. 613	9
Pernatto v. *United States*, 104 F. 2d 427	8
Pine v. *United States*, 135 F. 2d 353, certiorari denied, 320 U. S. 740	6
United States v. *Breen*, 96 F. 2d 782, certiorari denied, 304 U. S. 585	9
United States v. *Graham*, 102 F. 2d 436, certiorari denied, 307 U. S. 643	8
United States v. *Gross*, 103 F. 2d 11	9
United States v. *Lewis*, 110 F. 2d 460, certiorari denied, 310 U. S. 634	6
United States v. *Manton*, 107 F. 2d 834, certiorari denied, 309 U. S. 664	13
United States v. *Petrie*, 59 F. 2d 1005	8

Statute:

Section 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825, 18 U. S. C. 398, known as the Mann Act	2

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1047

BLAISE PASQUA, MILDRED FERRIS AND MARY LEE HENDRIX, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 380–382) is reported at 146 F. 2d 522.

JURISDICTION

The judgment of the circuit court of appeals was entered January 3, 1945 (R. 382), and a petition for rehearing was denied February 20, 1945 (R. 394). The petition for a writ of certiorari was filed March 17, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether, in a prosecution for a violation of the Mann Act, it was proper to permit the Government to introduce evidence of the character of the place to which the women named in the indictment were transported.

2. Whether the conduct of the trial judge was such as to deprive petitioners of their right to a fair and impartial trial.

3. Whether the trial judge's charge on the presumption of innocence, to which petitioners reserved no exception, was so clearly erroneous that the circuit court of appeals abused its discretion in declining to notice such unassigned error and to reverse the conviction on such ground.

STATUTE INVOLVED

Section 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825, 18 U. S. C. 398, known as the Mann Act, provides in part:

> That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauch-

> ery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

STATEMENT

Petitioners were indicted in the United States District Court for the Eastern District of Louisiana in two counts, each charging violation of the Mann Act by the transportation of a different group of girls on different occasions from Georgia to Louisiana for the purpose of prostitution and debauchery and with intent to induce, entice and compel the girls to practice prostitution and to give themselves up to debauchery (R. 2–3). Petitioners were found guilty on both counts (R. 12). Petitioner Pasqua was sentenced to five years' imprisonment on each count, the sentences to run consecutively (R. 19–20), and the two other petitioners were sentenced to five years on the first count and three years on the second count, the sentences to run consecutively (R. 21–23). On appeal the judgments of conviction were affirmed (R. 382).

The evidence for the Government may be summarized as follows:

Petitioner Pasqua owned and operated a roadhouse tavern known as the Highway Club near Thibodeaux, Louisiana (R. 44, 45, 88, 204). The establishment contained a bar at which liquor was sold and a dimly lighted dance floor (R. 153, 224, 242, 281). The girls employed by Pasqua lived in rooms adjacent to the dance floor (R. 50–51). They received no salary (R. 135–136, 289) but were paid a commission on each drink which they induced customers to order for themselves and for the girls (R. 49–50, 119, 249, 289). In order to encourage the men to buy drinks, the girls would engage in lewd and lascivious dancing with the customers (R. 122, 150–151, 153–154, 279) and would permit the customers to take indecent liberties with them (R. 279, 326). Pasqua would point out to the girls the customers who had money (R. 74, 75, 260). Almost all of the girls who worked for Pasqua engaged in prostitution (R. 75, 78, 129).

Petitioners Ferris and Hendrix were employed in Pasqua's establishment. In May 1941, these two women returned to their home in the vicinity of Ellijay, Georgia. There they induced the three girls named in the second count of the indictment to return with them to work at the Highway Club. (R. 246–248, 286–288, 291.) A few days after the arrival of these girls at Pasqua's place, the local

sheriff informed Pasqua that two of the girls were too young to work in such an establishment (R. 160, 264, 294). The third girl remained and subsequently practiced prostitution because she found her income from commissions on drinks insufficient (R. 257–258, 264–265). She had not been a prostitute prior to the time she was brought to Louisiana by petitioners (R. 258).

Pasqua hired a local taxi owner to return the other two girls to their home in Georgia (R. 159, 162). Petitioners Ferris and Hendrix accompanied the two girls to their home in Georgia (R. 35, 107, 160) and there renewed their efforts to recruit girls to work for Pasqua (R. 37, 40, 112–113, 214–215). They brought back with them the three girls named in the first count of the indictment (R. 43–44, 116–117, 162, 216). Two of these girls were aged 15 and 17, respectively (R. 34, 117), and had not theretofore engaged in sexual intercourse (R. 80, 144). All three petitioners urged these two girls to engage in prostitution (R. 54–56, 58, 74, 78, 122, 125–126, 140–143). Pasqua told them that if they would "fill dates" they would make more money and have pretty clothes (R. 54, 55–58, 126) and he told one of them that she was "no good to him" if she did not "fill dates" (R. 57, 69, 71). Pasqua himself tried to induce the fifteen-year old girl to have illicit relations with him (R. 126). When one of the girls "filled a date" Pasqua would take away part of

the tokens representing her commissions on drinks as his "cut on the date" (R. 73).

ARGUMENT

Petitioners assert (Pet. 4, 5, 6, 13) that the trial judge improperly allowed the Government to introduce into evidence proof of the bad character of petitioner's place and thus to impugn the character of all the petitioners, despite the fact that they did not take the stand in their own behalf. Petitioners are apparently objecting to the fact that government witnesses were allowed to testify to the character of the dancing in Pasqua's club and to the fact that the girls there employed regularly engaged in prostitution (see *supra*, p. 4). Such testimony was, however, clearly relevant as tending to prove that petitioners knowingly transported each of the girls to a place which would tend to "induce her to give herself up to a condition of debauchery which eventually, necessarily and naturally would lead to a course of immorality sexually." *Athanasaw* v. *United States*, 227 U. S. 326, 331; see *Pine* v. *United States*, 135 F. 2d 353, 356 (C. C. A. 5), certiorari denied, 320 U. S. 740; *United States* v. *Lewis*, 110 F. 2d 460, 464 (C. C. A. 7), certiorari denied, 310 U. S. 634. From the reference to their petition for rehearing in the court below (Pet. 13; see R. 389) it appears that petitioners particularly complain of two remarks by the judge during the testimony of a witness who worked at a club adjacent to the

Highway Club. When she testified that Pasqua tried to induce her to work for him selling drinks, petitioners' counsel objected on the ground that such testimony would place the character of petitioner in issue, and the judge stated that it was "unfortunate that the character of the defendant was so intimately associated with the character of the place" (R. 206). She also testified that Pasqua told her that the two other petitioners were making money by "hustling" and, when defense counsel objected to such testimony, the judge stated that there was "sufficient evidence already before the jury, from which the jury, at this time, might draw a conclusion adverse to the character" of these two petitioners (R. 207–208).[1] The judge's first remark was a correct statement of the law. As to the second, while it might have been better to have avoided a reference to petitioners' character as distinct from the nature of the place in which they worked, the remark could scarcely have been prejudicial in view of the testimony already before the jury that these two petitioners had themselves urged the girls whom they transported to engage in prostitution (R. 78, 141).

2. Petitioners contend (Pet. 4, 5, 7–8, 12–13) that the trial judge deprived them of a fair trial

[1] On objection by defense counsel the prosecuting attorney had withdrawn a specific question addressed to a previous witness as to whether the two female petitioners engaged in prostitution and the court admonished the jury not to draw any inference from the prosecutor's question (R. 76–77).

by questioning various witnesses from time to time. The circuit court of appeals disapproved of the practice but held that the judge's conduct did not constitute prejudicial error (R. 381–382). We think that the circuit court of appeals may have been unduly critical of the trial judge. Almost all the witnesses for the Government displayed an obvious reluctance to testify (see R. 51–53, 124–125, 207, 220, 230, 253, 320) and, in many instances, the court's interrogation was designed to impress the witnesses with the fact that they were under oath and were expected to tell the truth (R. 47, 59, 67, 91–92, 110–111, 125, 144–145, 183, 220, 223, 307).[2] The other questioning by the trial judge was largely an effort to have the witnesses explain apparent inconsistencies in their testimony (R. 56, 87, 98–100, 101–102, 184–185, 235–237, 243–244, 250–252, 301–302, 306–307). The record as a whole, we think, shows that the trial judge did no more than exercise the well-established right of federal judges to interrogate

[2] Petitioners object (Pet. 4, 5) to the fact that a number of government witnesses were allowed to refresh their recollections from documents identified by the witnesses as signed statements which they had given to investigating officers. It is well established, however, that it is within the discretion of the trial judge to permit such statements to be used in the manner that the prosecution here used them. *Hyde* v. *United States*, 225 U. S. 347, 377–378; *United States* v. *Graham*, 102 F. 2d 436, 441 (C. C. A. 2), certiorari denied, 307 U. S. 643; *Pernatto* v. *United States*, 104 F. 2d 427, 428 (C. C. A. 3); *United States* v. *Petrie*, 59 F. 2d 1005, 1006 (C. C. A. 2).

witnesses in an impartial manner in the interest of eliciting a full disclosure of material facts. *United States* v. *Gross,* 103 F. 2d 11, 13 (C. C. A. 7); *United States* v. *Breen,* 96 F. 2d 782, 784 (C. C. A. 2), certiorari denied, 304 U. S. 585; *Hargrove* v. *United States,* 25 F. 2d 258, 259 (C. C. A. 8); *Kettenbach* v. *United States,* 202 Fed. 377, 385 (C. C. A. 9), certiorari denied, 229 U. S. 613. Clearly, there was no such impropriety as would warrant reversal of petitioners' convictions on such ground. *Glasser* v. *United States,* 315 U. S. 60, 83.

3. The judge charged the jury on the presumption of innocence as follows (R. 338–339):

> * * * The defendants are not called upon to prove themselves innocent of the charges laid against them in the indictment; they may rely upon the presumption of innocence that attends them at all times until and unless, in the course of the trial, they are proved guilty, beyond a reasonable doubt. Now, the rule of "the presumption of innocence" imposes upon the government, therefore, the burden of establishing the guilt of each defendant, beyond a reasonable doubt. But, as forceful as that rule is in the protection of one who stands charged with crime, it must not be forgotten that it is not intended, nor has it ever been intended, as extending aid to one who in fact is guilty, so that he or she may escape just punishment. The rule is but a

humane provision of the law, intended to prevent, so far as human agencies can, the conviction of an innocent defendant, but nothing more. You must, of course, give serious consideration to this "presumption of innocence," when, once having retired to deliberate upon your verdict, you review, weigh and consider the whole body of the evidence. As I have stated, the burden rests upon the government, remember, to prove, beyond a reasonable doubt, that the defendants are guilty of the charges laid against them in the indictment. But this "presumption of innocence" will avail the defendants no further, so soon as there is made out prima facie evidence, of the truth of the charges laid against him or her in the indictment. That prima facie evidence bars the presumption of innocence, because the "presumption" is no evidence at all, and plays its part only so long as there is absence of legal evidence as to the particular fact to be established. If such prima facie evidence, which so brushes aside the presumption of innocence, when found worthy of belief by the jury, is not met by the defendants' own opposing satisfactory evidence, then that simple prima facie evidence, if it convinces you gentlemen, as the exclusive judges of the facts, that guilt has been proved, beyond a reasonable doubt, would justify you in rendering a verdict of guilt as charged. You are the sole and exclusive judges of the evi-

> dence, and of the credibility of the witnesses who have testified before you in this case.

Counsel took no exception to this portion of the judge's charge (cf. R. 347–349) and the circuit court of appeals held that "while that charge contains errors, the guilt of the defendants is so overwhelmingly shown by the record that we think the administration of justice does not require us to take notice of such errors" (R. 382).

There is no merit in petitioners' contention (Pet. 6–7, 10–12) that the circuit court of appeals abused its discretion in declining to notice such unassigned error and to reverse the conviction on such ground. The trial judge may have used inept language[3] but the general tenor of his charge on the presumption of innocence was not objectionable. He did instruct the jury that petitioners entered the trial with a presumption of innocence in their favor, that the jury must give "serious consideration" to the presumption and that the burden rested on the Government to overcome the presumption and establish guilt beyond a reasonable doubt. Although he spoke of

[3] In a prior decision, *Gomila* v. *United States*, 146 F. 2d 372, the Circuit Court of Appeals for the Fifth Circuit had reversed a conviction in a case which it considered doubtful on the evidence because of an accumulation of errors, including a charge similar to the one here given by the trial judge that the presumption of innocence was not intended to protect a person who was in fact guilty so that he might escape just punishment.

overcoming the presumption by prima facie evidence, he explained that the prima facie evidence must be sufficient to convince the jury beyond a reasonable doubt (R. 339). In essence the charge is not very different from that approved by this Court in *Allen* v. *United States*, 164 U. S. 492, 500, a capital case.[4] See also *Boehm* v. *United States*, 123 F. 2d 791, 811 (C. C. A. 8), certiorari denied, 315 U. S. 800. Moreover, subsequent to the portion of his charge quoted above, the trial judge several times again adverted to the necessity that the Government prove its case beyond a reasonable doubt and fully and correctly defined "reasonable doubt" (R. 341, 342, 343, 344, 345, 348–349). Petitioners' counsel obviously thought the charge fair to his clients for, although he reserved numerous exceptions during the trial, he did not except to the portion thereof of which he now complains. The circuit court of appeals, therefore, properly held that petitioners' objection to

[4] The charge in the *Allen* case was as follows:

"* * * a party starts into a trial, though accused by the grand jury with the crime of murder, or any other crime, with the presumption of innocence in his favor. That stays with him until it is driven out of the case by the testimony. It is driven out of the case when the evidence shows, beyond a reasonable doubt, that the crime as charged has been committed, or, that a crime has been committed. Whenever the proof shows, beyond a reasonable doubt, the existence of a crime, then the presumption of innocence disappears from the case. That exists up to the time that it is driven out in that way by proof to that extent."

the judge's charge, raised for the first time on appeal, presented no ground for reversal. *Johnston* v. *United States*, 318 U. S. 189, 201; *Holmgren* v. *United States*, 217 U. S. 509, 523–524; *Allis* v. *United States*, 155 U. S. 117, 122; *United States* v. *Manton*, 107 F. 2d 834, 846 (C. C. A. 2), certiorari denied, 309 U. S. 664.

CONCLUSION

The decision below is correct. It presents no conflict of decisions or questions of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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